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Supreme Court, U.S.
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No. 02-1736

In The

Supreme Court of the United States

JAMES B. TWISDALE,

Petitioner

v.

JOHN W. SNOW, Secretary of the Treasury,

Respondent

On Writ of Certiorari to the
Untied States Court of Appeals
For the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Introduction to Question 1

The Seventh Circuit ruled that the protection offered under *42 U.S.C. 2000e-3(a)* is restricted to only employees who have made a charge of discrimination. Stating that the issue "is both clean and novel" and no case law or scholarly commentary existed. Case law and scholarly commentary does exist, all of which supports a literal and all inclusive interpretation as intended by Congress.

1. Does the protection offered under Section *42 U.S.C. 2000e-3(a)* for employees who have made a charge, testified, assisted, or participated in any manner in an EEOC investigation apply to all employees with no regard to their role in the alleged acts of a Title VII violation?

Introduction to Question 2

The Seventh Circuit in its analysis of a hostile work environment did not apply the standards established by the Supreme Court in the cases of *Harris v. Forklift Systems, Inc* and more recently *Oncale v. Sundowner Offshore Services, Inc.* correctly. The court below further imposed new criteria that subsequent job assignments and a promotion will cancel out any previous inflicted harassment.

2. Did the Plaintiff suffer a hostile work environment sufficient to affect his compensation, terms, conditions, or privileges of employment, under *42 U.S.C. 2000e-2(a)(1)* and if so, would other job assignments, performance bonuses and a promotion cancel out the harassment?

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STATEMENT OF THE CASE

Mr. Twisdale, the Plaintiff, filed a complaint and demand for jury trial on May 26, 2000, bringing an action as redress for Title VII claims for discrimination, hostile work environment and retaliation. The Appellee filed its answer to Twisdale's complaint on August 29, 2000. On April 9, 2001, the Defendant's Motion for Summary Judgement and accompanying documents were filed. Twisdale's Response Brief in opposition to Defendant's Motion for Summary Judgement and accompanying documents were filed on October 17, 2001, and the Appellee's Reply Brief in Support of Defendant's Motion for Summary Judgement and accompanying documents were filed on December 17, 2001.

On February 27, 2002, the District court granted the Defendant's Motion for Summary Judgement on both of Mr. Twisdale's claims. On the same day the district court entered final judgement in favor of the Appellee Paul H. O'Neill. On March 22, 2002, Mr. Twisdale timely filed a Notice of Appeal.

On July 11, 2002, Mr. Twisdale filed his Appeal Brief with the Seventh Circuit. On August 12, 2002 the Defendant-Appellee filed their Response Brief. Then on August 23, 2002 Plaintiff-Appellant filed his Reply Brief.

On April 10, 2003, the Seventh Circuit affirmed the District Court's judgement.

SUMMARY OF THE FACTS

Mr. Twisdale, the Plaintiff (Twisdale), a White male began his career working for the Internal Revenue Service (IRS) in July 1981 as a GS-7 Revenue Agent. Twisdale was promoted three times from 1982 to 1986, resulting in a GS-12 Revenue Agent status. Between 1987 and 2000 Twisdale

served the IRS in the following progressive responsible positions: Examination Group Manager as a GM-13, GM-14 Senior Regional Analyst, GM-14 Supervisory Regional Team Leader, GM-14 Field Examination Branch Chief, and GM-14 Quality Measurement Branch Chief. From 1994 to 2000 Twisdale has spent his career in the Indiana District in Indianapolis, Indiana. In 1997 James Rogers, (Rogers) African-American male became District Director in the Indiana District.

In his capacity as a second level supervisor, Twisdale signed off on Barry Madison's (B. Madison), an African-American female, evaluation rating her all 3's which is fully successful. The Evaluation was initiated by B. Madison's immediate supervisor, Mary Lue Graham, a White female.

B. Madison filed a charge of discrimination against her immediate supervisor, for giving her an evaluation less than what she expected. It was stated by Rogers that B. Madison had implicated Twisdale as a "discriminating official." Twisdale participated as a witness in the EEO investigation since he approved the evaluation and also participated as a supervisor charged with resolving the complaint. Unable to resolve the complaint, the matter was elevated to Rogers who did resolve it by giving B. Madison her demands. Neither Twisdale nor Graham was ever charged with discrimination or any other offense.

During this same period Twisdale was ordered by his immediate supervisor, Barry Whaley, White male, to investigate B. Madison for alleged acts of misconduct. The investigation resulted in Twisdale issuing B. Madison a letter of counseling for lying.

Then on February 10, 1998 Rogers held an impromptu senior staff meeting and ordered Twisdale to attend and address why he was investigating B. Madison. Rogers who

is 3 levels senior to Twisdale, insisted the investigation of B. Madison was not necessary. Rogers learned of the investigation directly from B. Madison earlier that day which prompted the meeting.

The next day Twisdale was ordered to meet with Gayle Morin (Morin) a White female and the Assistant District Director, Rogers's immediate subordinate and ordered Twisdale to continue the investigation.

Then on March 11, 1998 Twisdale was notified by his acting supervisor that Rogers had ordered him to reassign all the employees in Twisdale's Disclosure Office. This is the same office that B. Madison worked in. An explanation was not provided. Rogers admits that at the time he ordered the reassignment of all of Twisdale's Disclosure Office personnel he had no problem with any of the people in that Office. The reassignments, however, were never carried out.

Then on April 10, 1998 Twisdale was informed that Rogers had ordered the internal audit of the Disclosure Office citing alleged privacy act violations. The audit was a "Single Office Audit" as defined by the IRS Internal Revenue Manual and required Regional Commissioner approval. There was no evidence that approval was ever asked for or provided prior to the audit taking place. Furthermore, the audit was executed despite a positive routine Regional review of the same office only months earlier. This was the first and only "Single Office Audit" ever requested by Rogers and ever performed in the Indiana District. Rogers acknowledged that there had been a recent review of the Disclosure Office at the time of the Internal Audit. He did not recall studying the prior report which was complementarily of Twisdale. Rogers admits to not having any conversation with Twisdale's immediate supervisor about any major problems in the disclosure function or his intentions to order an Internal Audit. Rogers never made a

claim that the Disclosure Office was not operating at a high quality manner. Rogers never discussed his request for the Internal Audit with his supervisor. Rogers had no specific information about the Disclosure Office that would have prompted him to request the audit. Results of the audit were very good and vindicated Twisdale of any Privacy Act violations.

Twisdale, on May 11, 1998 initiated a formal request for EEO Counseling citing "Working Conditions." The Counseling went to a formal request for an investigation on July 24, 1998 citing discrimination because of Race and Color. The Complaint was modified on August 17, 1998 to include "Retaliation".

On March 10, 1998 Twisdale issued a memorandum of counseling to B. Madison for lying. In June or July 1998 Mary Murphy, (Murphy) African-American female, Twisdale's new immediate supervisor had the memorandum withdrawn at the request of B. Madison through an Agency Grievance Process. Counseling memorandums are to remain on file for two years. Murphy acknowledged that E. Madison lied but still removed the memorandum.

Then on April 16, 1998 Twisdale was informed his Problem Resolution Program in his Quality Branch was to be reviewed. The review like the internal audit was unprecedented in the history of the District. Three subordinate managers were used to conduct the review. Twisdale rebuts the review report on July 9, 1998 citing disregarded directives, insubordination, untruthful statements, inaccuracies and protocol violations. Despite the documented concerns the report was never officially withdrawn.

On August 5, 1998 Twisdale initiated the formal request for EEO Counseling citing "Harassment." The Counseling

went to a formal request for an investigation on October 17, 1998 citing discrimination because of "Race", "Color" and "Retaliation".

During 1998, 1999 and 2000 Twisdale sought employment with other Government agencies as well as employment in other locations within the IRS.

On November 19, 1998 Everette Madison, (E. Madison) a senior supervisor who is African-American and husband to B. Madison alleged in a memorandum to Twisdale's supervisor, Murphy, and the IRS Inspection Service that Twisdale took IRS records, caused a serious breach of security, abused his managerial authority and made an unauthorized disclosure. This resulted in a criminal investigation and Twisdale's subsequent clearance.

On March 18, 1999 Twisdale initiated the formal request for EEO Counseling citing "Harassment and Working Conditions."

In December 1998 Murphy reassigned the Disclosure Office away from Twisdale and reduced his management span of control by 50%. Murphy did not provide any compensating resources or programs.

On August 2, 1999 Twisdale submitted a memorandum complaining about continued acts of retaliation from another employee. This resulted in his immediate removal from his only acting assignment.

From June 22, 1998 through March 17, 2000 Twisdale was bypassed 156 times for acting Division Chief assignments in favor of 10 actors that did not possess the same permanent grade, experience and promotability as him. In fact, all 10 people were not promotable to the GS-15 level which is the level of a Division Chief.

On September 9, 1999 Twisdale initiated the formal request for EEO Counseling citing "Working Conditions." The Counseling went to a formal request for an investigation on November 2, 1999 citing "Retaliation".

Twisdale was treated for colitis on August 26, 1998, November 3, 1998 and again on January 29, 1999. His Colitis is triggered by stress that can not be resolved, stress that appears to have no end.

From 1998 to 2000 Twisdale served on 4 committees or taskforces. He also received an automatic bonus that when along with his performance rating. In May 2000 Twisdale was selected for a promotion to the GS-15 level through a competitive process. None of the alleged discriminating officials were involved in Twisdale's selection.

INTRODUCTION AND SUMMARY OF ARGUMENT 1

Employees who participate in an EEOC investigation have long enjoyed the protection against retaliation offered by *42 U.S.C. 2000e-3(a)*. This is because the law is very specific and provides a shield from reprisal against any employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "participation clause"). *Id.* This protection has been unconditional and unchallenged by any Appellate court until now. The Court below in its decision has rewritten the law to exclude both "assisted" and "any manner" from the statute only to insert a restrictive interpretation. In doing so, only employees who participate as a witness for the employee and the employee him/herself would receive protection. Employees, who would give testimony, assist or participate in "any manner" other than what the Seventh Circuit has said, would do so at their peril with no protection. The decision may appear to be a

politically correct one, designed to champion only those who are discriminated against but it serves only to chill or prevent the sincere and willing participation of third party witnesses, resolution efforts by supervisors and those falsely accused of discrimination that could bring valued testimony to help resolve a complaint at the early stages. The decision stands alone among all the Circuits and is unsupported by case law. It also conflicts with Congressional intent.

The Court openly admits that this issue "is both clean and novel" It also stated "we cannot find any hints in the case law, the legislative history, interpretations by government agencies, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employers ire". It is suggested that the reason this issue is "clean and novel" is because no one has questioned Congress' intent because the statuary language is clear. However, there is considerable legal analysis on the "participation clause". And in fact there is a 1997 Eleventh Circuit case exactly on point with similar facts that was decided in favor of the employee. See *Meritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997).*

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-3(a)

I. LEGAL ANALYSIS

The participation clause prohibits employment discrimination against an employee for "filing a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. 2000e-3(a) (1994).* Congress, however, did not explicitly define the terms "participat[ion] in any manner" or

"investigation ...under this subchapter." While not defined by Congress, the term "participat[ion] in any manner" is clear (The first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [The courts'] inquiry must cease if the statute language is unambiguous and 'the statutory scheme is coherent and consistent' *Robinson v. Shell Oil Co. 117 S. Ct. 843, 846 (1997)* (quoting *United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)*; see also Norman J. Singer, Sutherland Statutes and Statutory Construction 46.01 (5th ed. 1992) (describing plain rule))). and indicates Congress' intent to provide employees covered by Title VII with broad retaliation safeguards. (See *Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir.1999)* ("The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection' upon employees covered by Title VII." (quoting *Pettaway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969))).* "Any," as used in congressional statutes, is not an ambiguous term; instead "it has an expansive meaning, that is, one or some indiscriminately of whatever kind".... "Any" means all. *Meritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997).* It follows that the participation clause protects employees participating in whatever manner in an investigation under this subchapter." *Clover, 176 F.3d at 1353.* Accordingly, the Seventh Circuit has exceeded its authority and in fact legislated new law with this decision.

The federal judiciary has long recognized the participation clause as "essential to the machinery set up by Title VII, (*Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999)* (citing *Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253 (4th Cir. 1998)*) and, accordingly, extended "exceptionally broad protection" to these activities under the participation clause. *(Pettway, 411 F.2d at 1005).* The courts have even held that "protection [under the

participation clause] is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong." *Booker, 879 F.2d at 1312.* And most important, because it relates to the instant case, the courts have held that the participation clause applies even where a witness (like the Plaintiff, Twisdale) does not testify or participate for the purpose of assisting the claimant. See *Merritt, 120 F.3d at 1185-89.* As explained in *Glover v. South Carolina Law Enforcement Division*:

> This conclusion [that "participating" employees receive unequivocal retaliation protection] is consistent with the purpose of the participation clause: Maintaining unfettered access to statutory remedial mechanisms. Section *704(a)'s* protections ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses. "Activities under the participation clause are essential to the machinery set up by Title VII." *Laughlin, 149 F.3d at 259 n.4* (internal quotations marks omitted). If a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less forthcoming. It follows that the application vel non of the participation clause should not turn on the substance of the testimony. See *Merritt, 120 F.3d at 1185-89* (participation clause applies even where witness does not testify for the purpose of assisting the Claimant); see also *Ross, 759 F.2d at 357 n.1* (antiretaliation provision

> applies even where underlying discrimination claim was not meritorious). "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." (*Pettway, 411 F.2d at 1005*).

The most compelling legal analysis that is on point with the instant case was written by the Eleventh Circuit in the case of *Meritt v. Dillard Paper Co., 120 F.3d (11th Cir. 1997)*. As in the instant case the Appellant employee testified as to his involvement on the alleged charges against him, the manager. The Appellee (employer) settled with the complainant and then took disciplinary action against those who they believe had caused the sexual harassment. The Appellant was fired and subsequently filed a Title VII claim of retaliation because of his participation. The District Court used a similar reasoning as the Seventh Circuit did on the instant case and dismissed it. The Eleventh Circuit, however, reversed the decision with a comprehensive analysis. Excerpts from Judge Carnes opinion:

> In construing a statute we must begin, and often should end as well, with the language of the statute itself. See *Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409, 113 S. Ct. 2151, 2157, 124 L.Ed.2d 368 (1992)*; see also *Bailey v. United States, 516 U.S. 137; 116 S. Ct. 501, 506, 133 L.Ed. 2d 472 (1995)*. As the Supreme Court has admonished, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed. 2d 391 (1992)*; see also, e.g., *United States v. Labonte, 520 U.S.*

751; 117 S. Ct. 1673, 1677, 137 L. Ed. 2d 1001 (1997) ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant."). "When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain, 503 U.S. at 254, 112 S. Ct. at 1149* (internal quotation marks omitted).

The anti-retaliation provision is straightforward and expansively written. Congress chose the language "testified" and "participated in any manner" to express its intent about the activity to be protected against retaliation. The word "testified" is not preceded or followed by any restrictive language that limits its reach. As to "participated in any manner, "the adjective "any" is not ambiguous; it has a well established meaning. Earlier this year, the Supreme Court explained, "Read naturally, the word "any' has expansive meaning, that is, "one or some indiscriminately of whatever kind.' "*United States v. Gonzales, 520 U.S. 1; 117 S. Ct. 1032, 1035, 137 L.Ed. 2d 132 (1997)* (citation omitted). Here, as in Gonzales, "Congress did not add any language limiting the breath of that word," so "any" means all. See id.

... The district court thought that Title VII's anti-retaliation provision does not cover an involuntary witness who is opposed to the claimant's position, because that provision

> was designed to protect those who "aid" and "assist" Title VII claimants. There are two insurmountable problems with that reasoning. First, whatever design might be perceived behind the provision, the actual design put forward through the language of the provision does not require that the testimony or other participation aid or assist the claimant. Instead of making assistance to the claimant a prerequisite for protection against retaliation, Congress chose to make assistance only one of four alternative means of qualifying for such protection. Congress prohibited retaliation against anyone who "made a charge, testified, assisted, or participated in any manner." *42 U.S.C. 2000e-3(a)* (emphasis added). Under the plain language of the provision, those who testify or otherwise participate in a Title VII proceeding are protected from retaliation for having done so, even if it turns out they were not of any assistance to the Title VII claimant.

In the instant case the court below raised a concern that a literal interpretation of the protection statute could not promote the policy of Title VII. The district court in *Meritt v. Dillard Paper Co.,* also put forth two arguments, one similar to the Seventh Circuit's. Both were dismissed by the Eleventh Circuit. The first argument cites the consequences of such a broad interpretation. Arguing, same as the Seventh Circuit, that it would place employers on dangerous ground when disciplining employees who have engaged in a Title VII violation discovered through participation in a EEOC investigation. The second argument is that a broad interpretation would inundate the federal judiciary with lawsuits. The Eleventh Circuit's response to the first argument:

> "... such policy concerns cannot alter our interpretation and application of clear statutory language. ... This is not a case where the absurd results principle is operative, because we cannot say that application of the plain meaning of the anti-retaliation provision's language produces an absurd result."

Response to the second argument:

> "For good or ill, Congress has decided that individuals who have "testified, assisted, or participated in any manner" in a Title VII proceeding are entitled to protection from retaliation because of that participation, and we must make room on our dockets for any resulting cases."

Now, regarding the assistance Twisdale provided during the investigation. The undisputed material facts clearly document Twisdale's efforts to resolve the Complaint. And as a supervisor it was his responsibility to do just that. This assistance as it relates to Section *2000e-3(a)* would also protect him. The Seventh Circuit is silent in this matter rather focusing on Twisdale's participation in providing testimony. Twisdale's efforts in providing testimony and his attempt to resolve the complaint can be labeled nothing but assistance. Removing this protection from supervisors, EEO officials, Labor Relation's officials, innocent witnesses, etc. would only create a greater number of complaints reaching the court system because there would be fewer resolutions during the administrative stages.

II. FLAWED HYPOTHETICAL

The court below used a hypothetical example to illustrate its legal position. It stated, supposing Twisdale after participating in an investigation and opposing the charge of discrimination on another employee was fired because he was a racist and a sexist. The court than claims Twisdale would then be entitled to reinstatement under a literal reading of the statute. This according to the Seventh Circuit would be a "perverse" interpretation.

This example when further scrutinized presents several flaws. First, this statute alone is insufficient for reinstatement. Yes, Twisdale would have established a prima facie case by showing he was engaged in a protected activity, that he suffered an adverse employment action and that the two were causally related. See *Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).* However, he would not automatically be reinstated as claimed by the court. Twisdale would still have to show that the adverse action taken against him was for non legitimate business purposes. The burden of showing pretext is on the Plaintiff. Second, it would leave vulnerable employees that are falsely accused of discrimination and therefore unprotected by the statute via their participation. For example, an innocent employee could be drawn into a Title VII claim through a false accusation of discrimination. The employer could use the results of that investigation to initiate an adverse action against the innocent employee. Title VII law should not be a single edge sword. It must cut both ways to ensure the protection of all. See *Meritt v. Dillard Paper Co.*, Third, and most important is the effect on witness testimony. Why would any employee or supervisor be forthcoming and cooperate not knowing if they will be offered protection under *42 U.S.C. 2000e-3(a).*

It is submitted that this hypothetical, which is the basis of the Seventh Circuit's decision is flawed. The outcome of this example would not produce the desired results as intended by Congress.

III. PLAINTIFF STILL BECOMES "PROTECTED" WHEN HE FILES HIS EEO COMPLAINT

In the event the Seventh Circuit's interpretation of *42 U.S.C. 2000e-3(a)* is deemed correct, the Plaintiff would have become protected when he filed his first complaint on May 11, 1998. Accordingly, all alleged acts of harassment subsequent to that date would be considered as retaliation. These acts would include removal of the counseling memorandum, the criminal investigation, removal of the Disclosure Office and related programs and responsibilities denied developmental acting assignments and treatment for the colitis condition. The Seventh Circuit never considered the Plaintiff's EEO complaint filings in its decision.

IV. CONCLUSION

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial.

INTRODUCTION AND SUMMARY OF ARGUMENT 2

What makes this case unique is the embedded issue that subsequent "rewards" experienced by the plaintiff after a series of harassing actions "cancel", according to the court below, "in any objective assessment" and, "any unpleasantness" suffered. So what the Seventh Circuit has said is if a man should break another mans arm deliberately and receives joy in watching the suffering but then pays for the doctors' bills, all should be forgiven and forgotten. The

injured man was made whole because of the paid medical bills or any other subsequent compensating act.

This reasoning leaves no room for accountability, discouragement of such behavior, and restitution for the suffering. If such actions were to be allowed then employers could engage in disparate treatment as long as the employee could withstand the harassment long enough to enjoy an employer offered compensation or "reward". And who is to say what qualifies as compensation or "rewards". A cycle of harassment could continue with no recourse. Endorsement of such a policy would not serve the interest of Title VII. What if an employee after suffering a hostile work environment is then promoted. Does the promotion negate the suffering? The High Court has already decided it does not. In *Burlington Industries* "Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation and was, in fact, promoted once." This is no different from the Plaintiff's case.

Just as interesting, the court below has either increased the threshold for "severe or pervasive" to an impossible level inconsistent with *Harris v. Forklift Systems, Inc. 510 U.S. (1993)* or failed to truly consider all the facts in the light most favorable to the Plaintiff. Several of these acts of harassment were specifically engineered to result in the Plaintiff's incarceration or termination.

The Plaintiff endured 10 objective acts of harassment during a 26 month period that created an unbearable work environment that caused him to seek other employment both outside the IRS and within the organization as a means for escape. The Plaintiff, a 20 year veteran of the IRS with a family to support had no other option but to endure the harassment. All of these actions when viewed in their totality altered the Plaintiff's "terms conditions, or privileges of employment" *(42 U.S.C. 2000e-2(a)(1).*

There should be no distinction between the pressures brought to bear against the Plaintiff in this case as the same pressures placed on an employee for sexual favors.

ARGUMENT

THE SEVENTH CIRCUIT ERRED IN INTERPRETING AND APPLYING 42 U.S.C. 2000e-2(a)(1)

I. LEGAL GENESIS AND STANDARD FOR HOSTILE WORK ENVIRONMENT

In *Meritor v. Vinson 477 U.S. 57 (1986)* the Supreme Court held that a hostile work environment is one in which the workplace is permeated with "discriminatory intimidation, ridicule, and insult" so severe or pervasive "that it alters the conditions of the victim's employment and creates an abusive working environment." The Court affirmed this standard in *Harris v. Forklift Systems, Inc. 510 U.S. (1993),* promulgating a two-part test to determine whether a hostile work environment is presented under Title VII. First the complained-of conduct must create "an environment that a reasonable person would find hostile or abusive." Second, the victim must "subjectively perceive the environment to be abusive" in order to satisfy the requirement that the conduct "actually altered the conditions of the victim's employment."

In assessing whether a hostile environment exist, the facts must be examined in their totality. The frequency and severity of the discriminatory conduct, whether the conduct was "physically threatening or humiliating, or a mere offensive utterance," and whether the conduct "unreasonably interfered with an employee's work performance" are among the factors to be weighted. In formulating this approach, the

Court's intention was to create "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* In *Harris* the Court observed that:

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

The Supreme Court further defined the contours of hostile work environment doctrine in *Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75 (1998).* It held the plaintiff could maintain a Title VII claim based on same-sex harassment. In doing so, the Court reiterated it's holding in *Harris* that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"

II. AFFIRMATION OF THE HOSTILE WORK ENVIRONMENT STANDARD

In two landmark decisions the Supreme Court outlined the circumstances in which employers may be liable for sexual harassment by superiors. *Burlington Indus. V. Ellerth, 524 U.S. 765 (1998)* and *Faragher v. City of Boca Raton, 524 U.S. 775 (1998).* It also affirmed its earlier decision in *Harris v. Forkliff Systems Inc., 510 U.S. 17 (1993),* for the standards necessary to establish a hostile work environment. The Court ensured that the *Harris* standards for establishing actionable sexual harassment are sufficiently demanding to prevent Title VII from becoming a "general civility code."

Regarding this concern, the Court specifically stated that "properly applied, [lower Courts] will filter out complaints attacking the ordinary tribulations of the work place such as sporadic use of language, gender related jokes and occasional teasing." *Faragher*. See also, e.g., *Carrero v. New York City Housing Authority, 890 F.2d 569, 577-578 (2d Cir. 1989)*; *Moylan v. Maries County, 792 F.2d 746, 749-750 (8th Cir. 1986)*; see also *I Lindeman & Grossman, 805-807, n.290* (noting cases granting summary judgment for employer because the alleged harassment was not sufficiently severe or pervasive).

In *Burlington* the court was very clear in accepting unfulfilled threats as a condition showing severe or pervasive conduct sufficient to establish a hostile work environment. It stated

> For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.... For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive.... The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

In the instant case the Plaintiff not only was subjected to unfulfilled threats, but several of them were actually executed. Although the officials did not succeed in their

desired outcome, the execution of the threats constitutes threats in themselves. This should be no different from sexual harassment threats where the employee did not succumb.

III. CLEAR EVIDENCE OF A SEVERE SUBJECTIVE AND OBJECTIVE HOSTILE WORK ENVIRONMENT

It is the Plaintiff's position the acts of harassment caused against him substantially exceed the High Court's standard for a hostile work environment. Sufficient evidence has been submitted to allow a reasonable jury to conclude that the Plaintiff was subjected to a subjective and objective hostile work environment and that the harassment were both sever and pervasive. The February 10, 1998 interrogation by Rogers, an IRS executive 3 levels above Twisdale was unprecedented. Rogers was unable to provide any similar examples where he summoned employees three levels below him for questioning. It can be inferred that Twisdale was actually admonished, humiliated and intimidated by Rogers in an attempt to stop him from investigating another African-American. Interesting, the very next day Twisdale was called into a meeting with his immediate supervisor Galye Morin, the Assistant District Director, during which time Morin clarified that Twisdale was to continue with the investigation on B. Madison. A need for clarification would not have existed without Rogers' attempt at intimidating Twisdale.

Then Twisdale was told all his personnel in his Disclosure Office would be reassigned. This is the same office B. Madison worked in. Rogers admits he had no problems with the Disclosure Office employees. He therefore had no business reason for such a decision. The proposed wholesale reassignment of the entire Office supervised by Twisdale was a threat.

Shortly after the threat Rogers ordered an internal audit of the Disclosure Office claiming Privacy Act violations in spite of the completion of a recent review which revealed no critical issues and was complementary of Twisdale. This was the first and only audit ever ordered by Rogers. Rogers acknowledges the recent Regional review of the disclosure office which resulted in no findings. Rogers admits to having no specific information about the Office that would have prompted him to request the audit. Rogers never discussed his intentions to request an audit with Twisdale's supervisor. Rogers never studied the previous Regional Review Report on the Office. And Rogers could not produce any evidence of the alleged Privacy Act violation. Finally, Rogers admits that he made an oral request directly to the Regional Inspector for the audit which is a violation of IRS procedures *(Internal Revenue Manual – Part X – Inspection (10)200 SubSection (10)213 Determining Audit Coverage, Last amended 8/20/1986))* which required Regional Commissioner approval first. Results of the audit vindicated Twisdale of Rogers' allegations. If Rogers had no business purpose for the audit then it can only be labeled a "witch hunt" or another threat. If the results were any different, Twisdale would have surely faced an adverse action at the design of Rogers.

These three instances happening in a very rapid sequence and all having Rogers and B. Madison in common clearly signaled to Twisdale that he was being targeted for harassment because he was white. This caused him to file an EEO complaint outlining all his fears and requesting the harassment to stop. The filing of a complaint would surely qualify as an event where an employee "subjectively perceives the environment to be abusive." See *Harris v. Forklift Systems.* These same instances would also qualify as objective evidence.

As if the intimidation, threat and unauthorized audit with no business purpose were not enough, the harassment continued. Twisdale soon was subjected to another review. This time they had chosen his Problem Resolution Program. This review like the Internal Audit was not routine but rather the exception and unprecedented. Rogers could not provide another example of this type of review, clearly indicating disparate treatment just like the Internal Audit. And just like the Internal Audit this review was another "witch hunt" or threat. Twisdale filed a rebuttal reporting disregarded directives, insubordination, untruthful statements, inaccuracies and protocol violations. The review and its results caused Twisdale to file another EEO Complaint claiming retaliation and harassment and asking for it to stop. The review would clearly qualify as an objective act and the subsequent filing of the second EEO complaint listing his concerns and asking for help would qualify as subjective perceptions.

Shortly after Murphy's arrival she took action to grant B. Madison's request to have the counseling memorandum issued by Twisdale during his investigation for lying removed. It is IRS policy to keep such memorandums on file for two years. Murphy did not dispute the fact B. Madison lied. She simply had the memorandum removed. Such a decision with the common link of B. Madison and Race, without a business reason to justify it can only be viewed as a discriminatory act against Twisdale, designed to undercut his authority and ability to function as a leader.

Then Twisdale learned of an allegation that he stole official IRS records, caused a serious breach of security, abused his managerial authority and made an unauthorized disclosure. The allegation was made by B. Madison's husband, E. Madison. This caused the IRS Inspection Service to conduct a criminal investigation on Twisdale. Once again Twisdale was vindicated of any wrong doing just

like the Internal Audit and Problem Resolution Program Review. The implications and potential outcome of a criminal investigation is one of the most serious matters for any employee or person to have to endure. How the Seventh Circuit can not consider a criminal investigation as sever is beyond the Plaintiff. The outcome of such an investigation could have resulted in his termination or worse, incarceration. In any event Twisdale must now live out the balance of his career with an investigative file of his alleged wrong doing. The court below never mentioned this act of harassment in its decision.

At this same time Twisdale learns he is being passed over for developmental acting assignments and that Murphy is selecting less qualified employees and even employees subordinate in grade over him to act in her place. In fact, it turns out that he was passed over 156 times in favor of 10 employees that did not possess the same grade, experience and promotability as him. Twisdale now files a third EEO complaint again asking the organization for help to bring this harassment to an end. The removal of the counseling memorandum, the criminal investigation and denied acting assignments would clearly qualify as objective acts and the filing of the EEO complaint a subjective act.

Then on August 2, 1999 Twisdale felt compelled to write a memorandum to Murphy titled "Continued Acts of Retaliation in which he alleged among other things harassment from other employees. He specifically stated: "It is my duty to inform you that these acts of retaliation have had a severe impact to my job attitude, performance, health and personal life." Because of this memorandum Twisdale is removed from the only acting assignment Murphy provided him. Twisdale again files a fourth EEO Complaint reporting the harassment and asking it to stop.

Finally, Twisdale was treated for colitis on August 26, 1998; November 3, 1998 and January 29, 1999. His colitis was caused to flare up because of the constant hostile work environment he had to endure. The Court below makes no mention of this in its decision.

In *Harris v. Forklift Systems* the Supreme Court stated that

> [w]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance

Clearly these acts of harassment qualify as numerous, frequent and objective. Ten of which were documented over a 26 month period.

The Plaintoff's 1) filings of the four EEO complaints, 2) feelings of fear and anxiety because of potential adverse actions that could have resulted form either the internal audit, review or criminal investigation, 3) fear of the possibility of imprisonment or fines from the criminal investigation, 4) reduced responsibilities from the reassigned Disclosure Office, 5) humiliation in the denied acting assignments when less qualified employees were given the opportunity, 6) humiliation in the public internal audit and review of his programs implying to employees that he was incompetent and distrusted, 7) stress-related medical problems and 8) constant interference from these audits, reviews and investigations all of which impacted on his ability to perform at his best. Justice Ginsburg noted in her

concurring opinion in *Harris*, to show unreasonable interference with a plaintiff's work performance,

> "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" *510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed. 2d 295 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).*

When all of the harassing events directed against the Plaintiff are viewed in their totality, the evidence is overwhelming and sufficient to establish severity and show a subjective and objective hostile work environment. These actions must fall into that "middle path" standard as defined in *Harris*. All of these actions when viewed in their totality altered the Plaintiff's "terms conditions, or privileges of employment" *(42 U.S.C. 2000e-2(a)(1).*

Harassment when conducted at such a high level in an organization can not be compared to the more common harassment such as name calling, unwanted sexual advances, derogatory postings of racial insults, etc. Rather experienced leaders who choose to engage in harassment are far more sophisticated and less likely to use overt and simple tactics. They will simply bring the power of the organization to bear on the victim in a more strategic manner. The Plaintiff's case is a study of racial harassment conducted by an educated and powerful employer.

The Plaintiff does not dispute the need for audits and reviews. He has experienced many in his career. But when an audit, review and a criminal investigation are all initiated by African-American supervisors against the Plaintiff and no one else and when there is no business purpose for them, and when they are unprecedented in nature then only one explanation is possible. If the Plaintiff was hypersensitive as implied by the court below he would never have established a 20 plus career in IRS management. Rather the Plaintiff's experience and instincts triggered an alarm that these actions were highly suspicious. IRS employees are trained to report ethical and conduct violations. The Plaintiff did what he was trained and expected to do.

The question comes down to this; do these acts in there totality represent a business environment a "reasonable person" would want to work in? The answer must be no.

IV. BONUSES, REWARDS AND PROMOTION

The perceived "rewards" are disputed by the Plaintiff as rewards. However, the Seventh Circuit still considered them. The task force and committees the Plaintiff participated on were his job responsibilities. The Plaintiff possessed specialized skills which made him a desirable commodity. If he had not agreed or volunteered for these assignments it would have reflected poorly on him and surely impacted his evaluation. Besides it is not the Plaintiff's nature to succumb to harassment. He had to press on and look for opportunities that could take him away from the hostile environment. His work ethic would not permit self pity. He also had faith that the system to address the alleged wrong doings would work. That is why he filed the EEO Complaints. And the Plaintiff is a 20 year veteran who has invested his entire career and life in the IRS. He has a wife and 4 children that depend on him for support, health care, education, etc. He simply had to endure the harassment

as a pet dog, dependent on its owner for food, would endure mistreatment. As for the bonuses received, these were automatic with his annual evaluation. The Plaintiff during his career as a second level supervisor performed at an exceptional level. All supervisors performing at that level received an automatic bonus. In regards to the promotion; it was received through a competitive process that was not controlled by the harassing officials in the Indiana District. And as stated earlier in *Burlington* an employee's promotion did not deflect from or cancel out the harassment.

V. CONCLUSION

For the foregoing reasons, the judgement of the Seventh Circuit should be reversed and the case remanded for trial.

APPENDIX

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REPRODUCED AND REFORMATTED SEVENTH CIRCUIT'S OPINION WITH NAMES OF THE JUDGES..... A-1

REPRODUCED AND REFORMATTED ORDER/JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT..... B-1

APPENDIX A-1

In The
United States Court of Appeals
For the Seventh Circuit

No. 02-1736

James B. Twisdale — Plaintiff-Appellant

v.

John W. Snow
Secretary of the Treasury, — Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
No.00-C-860-Y/F-Richard L. Young, Judge.

Argued December 10, 2002 – Decided April 10, 2003

JUDGES: Before FLAUM, Chief Judge, and POSNER and WILLIAMS, Circuit Judges.

OPINIONBY: POSNER

Opinion: POSNER, Circuit Judge. James Twisdale, an employee of the Internal Revenue Service, brought suit against his employer under Title VII of the Civil Rights Act of 1964, charging that black supervisors harassed him because he is white and retaliated against him for his opposing a black employee. The district court granted summary judgment for the defendant.

The pertinent facts, stripped to bedrock and viewed as favorably to Twisdale as the record will permit (which is not very favorable), are as follows. In 1997 Twisdale was chief of the IRS's Quality Measurement Branch in Indianapolis; his pay grade was GS-14. One of the employees whom he supervised was a black woman named Barry Madison. She

filed a charge of employment discrimination on grounds of race and sex with the IRS's equal employment office. The charge was investigated and Twisdale participated in the investigation in various ways, for example by giving information to the EEO investigator. [*2] Twisdale was skeptical of Madison's claim. Later he was instructed by his superiors to investigate an alleged ethical violation by Madison. He did so and determined that she had indeed committed an ethical violation, though a minor one, and he issued a reprimand to Madison – precipitating a charge of discrimination by her against him. He claims that as a result of his opposition to Madison's claim of discrimination, as well as his reprimanding her and being white, he was subjected to various humiliations by his black supervisors. The humiliations of which he complains included audits of some of the programs that he administered, a delay in giving him "acting supervisor" assignments, which apparently were prized, and above all the removal from his purview of the Disclosure Office, which had three employees and is responsible for protecting taxpayers' privacy, and of the Problem Resolution Program, a program for dealing with taxpayer complaints. Madison's original complaint of discrimination was eventually resolved in her favor, by there was never a determination that Twisdale had discriminated against her, although the IRS agreed to remove his reprimand of her from her personnel file. [*3]

The period of harassment is alleged to have continued through August of 1999. Yet during this period Twisdale received generous performance-related bonuses and coveted assignments to IRS national task forces, though he argues that he received these assignments because the removal of the Disclosure Office and the Problem Resolution Program from his supervision left him with unwanted time on his hands. The following year he was promoted to a more responsible job at the next-higher pay level, GS-15, and while the promotion required him to relocate to West

Virginia he had made clear in applying for the promotion that he was willing to move and indeed he had listed 27 cities, though none in West Virginia, to which he would be happy to transfer. He accepted the transfer to West Virginia and remains employed by the IRS there, in a position as we said of greater responsibility than he had in Indianapolis.

There is one legal issue that is both clean and novel, and although the government reserved it rather than arguing it as an alternative ground for upholding the district court's decision, it was thoroughly ventilated at the argument of the appeal and being a pure issue of law we can with [*4] propriety decide it despite its not having been briefed. See Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); Sestric v. Clark, 765 f.2d655, 657 (7th Cir. 1985); Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 142 (2d Cir. 2000); cf. Hill v. American General Finance, Inc., 218 F.3d 639, 642, 645 (7th Cir. 2000).

[HN1] The provision of Title VII that concerns retaliation forbids an employer "to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under "the statute, 42 U.S.C. 2000e-3(a). (The retaliation provisions of the other principal federal employment discrimination statutes are materially identical. See 29 U.S.C. 623(d) (Age Discrimination in Employment Act); 29 U.S.C. 794(d) (Rehabilitation Act); 42 U.S.C. 12203(a) (Americans with Disabilities Act).) Read literally, the provision protects even an employee who like Twisdale participates in an investigation on the [*5[side of the employer rather than on the side of the employee who made the charge of discrimination. Suppose hypothetically that Twisdale had opposed Barry Madison's charge of race and sex discrimination because he is a racist and a sexist and that he had been fired for having opposed her her charge. On his view of the scope of the retaliation provision, he would

be entitled to reinstatement. He is claiming in effect the absolute immunity that prosecutors and judges enjoy when performing prosecutorial and judicial functions, respectively.

How such an interpretation could promote the policy of Title VII is beyond us. [HN2.] The statute has the limited purpose of preventing certain forms of discrimination. The retaliation provision backs up this central thrust by protecting employees who invoke the statutory machinery for rectifying violations. We cannot find any hints in the case law, the legislative history, interpretations by government agencies, or scholarly commentary of any purpose of protecting employees whose resistance to charges of discrimination made by their coworkers provokes the employer's ire. Until this case, so far as we can determine, everyone concerned in the administration of[*6.] Title VII and cognate federal antidiscrimination statutes had assumed that the retaliation provision was for the protection of the discriminated against, and not their opponents. E.g., Robinson v. Shell Oil Co., 519 U.S. 337, 347, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997); Heuer v. Weil-McLain, 203 F.3d 1021, 1023 (7th Cir. 2000); Petersen v. Utal Dept of Corrections, 301 F.3d 1182, 1189 (10th Cir. 2002); Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998). As in the hypothetical case we put, the employer would be sitting on a razor's edge if it could not discipline employees whose opposition to discrimination charges placed the employer in jeopardy of violating an employee's statutory rights.

Twisdale did participate in an investigation of a discrimination charge, and so comes within the literal terms of section 2000e-3(a). But awkwardly, since the first act protected by the section is making a charge, which suggests that the subsequent acts listed – testifying, assisting, and participating – refer to acts in support of the charge. He would be on solider ground if instead of "because he has

made a charge" [*7.] the statutory words were "because he has made our opposed a charge." In effect he asks us to insert the term that we have italicized. But, as we have explained, this would merely gum up the statutory works. [HN3} Perverse and absurd statutory interpretations are not to be adopted in the name of literalism; they merely show the limitations of literalism as a mode of interpretation.

Twisdale has another string to his bow, however; for remember that he is arguing that he was harassed on account of his race and not just on account of his participation in the investigation of Barry Madison's charge of discrimination. (His further charge that he was harassed for reprimanding Madison seems to be a variant of his race charge. If not, it would have no purchase in the statute.) That claim fails too, because the harassment of which he complains was not severe enough to have altered the terms or conditions of his employment. [HN4] Title VII does not create a remedy against harassment as such; the harassment must – this explicit in the statute – amount to discrimination "with respect to [the employee's] compensation, terms conditions or privileges of employment. 42 U.S.C. 2000e-2 (a)(1)[*8]. The cases paraphrase this requirement either as a tangible employment action, 'that is, 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,; or as a 'materially adverse employment action.''' Hernreiter v. Chicago Housing Authority, 315 F.3d 742. 743-44 (7th Cir. 2002) (case citations omitted); see also Clark County School Dist v. Breeden, 532 U.S. 268, 270-71, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001) (per curiam); Allen v. Chicago Transit Authority, 317 F.3d 696, 701 (7th Cir. 2003); Silk v. City of Chicago, 194 F.3d 788, 807-08 (7th Cir. 1999); Gu v. Boston Police Dept., 312 F.3d 6, 14 (1st Cir. 2002).

To determine whether this requirement has been satisfied requires consideration of the employee's total workplace environment; and here the performance bonuses, the task force appointments, and the promotion to a more responsible and better-paying job go quite far enough to cancel, in any objective assessment, any unpleasantness that Twisdale [*9] might have experienced because his programs were audited and one program and three employees were removed from his purview and he didn't get as many acting-supervisor assignments as he would have liked. In any event, that unpleasantness, even if not balanced by rewards both tangible and intangible, falls short of the level of severity required to trigger judicial intervention under Title VII. Twisdale emphasizes the diminution of his responsibilities; and [HN5] it is true if paradoxical that lightening a worker's load can constitute actionable harassment, Dahm v. Flynn, 60 F3d 253, 256-57 (7th Cir. 1994) – but only if by depriving him of the opportunity to maintain and improve his skills it impedes his career see Grayson v. City of Chicago, 317 F.3d 745, 750 (7th Cir. 2003); Hernreiter V. Chicago Housing Authority, supra, 315 F.3d at 744; Freedman v. MCI Telecommunications Corp., 347 U.S. App. D.C. 112, 255 F.3d 840, 847-48 (D.C. Cir. 2001), which did not happen here, as indicated by his promotion. Grayson v. City of Chicago, supra, 317 F3d at 750. The statute does not protect the hypersensitive[*10] employee who is not deliberately targeted by the employer from the irritations endemic to the employment relation. Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 978 (7th Cir. 2000); Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990).

APPENDIX B-1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGEMENT – WITH ORAL ARGUMENT

Date: April 10, 2003

Before: Honorable Joel M. Flaum, Chief Judge
Honorable Richard A. Posner, Circuit Judge
Honorable AnnClaire Williams, Circuit Judge

No. 02-1736

James B. Twisdale
Plaintiff – Appellant

V.

John W. Snow, Secretary of the United States Department of the Treasury,
Defendant – Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indanapolis Division No. 00 C 860, Richard L. Young, Judge

The Judgement of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)